

Editor's note: Reconsideration denied by order dated June 3, 1975

ANN McNOISE
DAVID LEE OPHEIM
MARTHA ANDERSON

IBLA 75-69, 70, 81

Decided May 7, 1975

Appeals from decisions of Alaska State Office, Bureau of Land Management, rejecting Native allotment applications AA 7375, 7570, and 6105.

Affirmed.

1. Rules of Practice: Hearings

An evidentiary hearing will be denied where the facts are not in issue and there is no chance of development of further facts not already of record upon which a decision may be predicated.

2. Alaska: Native Allotments

Lands withdrawn from appropriation under the non-mineral public land laws and lands within Alaska state selection applications are not open to the initiation of Alaska Native allotment claims.

3. Alaska: Native Allotments

An allotment right is personal to one who has fully complied with the law and regulations. A Native who applies for withdrawn lands must show that he did comply with the law prior to the effective date of withdrawal, and he may not tack on his deceased parents' use and occupancy to establish a right for himself prior to the withdrawal.

4. Alaska: Native Allotments

The Alaska Native Claims Settlement Act of December 18, 1971, extinguished all aboriginal claims and rights of the natives and terminated whatever aboriginal rights if any, the natives may have had.

APPEARANCES: Michael J. Frank, Esq., and James Grandjean, Esq., Alaska Legal Services Corporation, for appellants.

OPINION BY ADMINISTRATIVE JUDGE RITVO

The appellants, listed above, filed applications under the Alaska Native Allotment Act, 43 U.S.C. § 270-1 (1970), and the regulations in 43 CFR Subpart 2561. The applications were rejected by substantially identical decisions; the appellants are represented by the same counsel and the appeals have been consolidated for the purposes of this decision.

The facts are not in dispute. Each allotment applicant initiated use after the lands were withdrawn by Executive Order 8344, dated February 10, 1940. The lands remained in such withdrawn status until June 26, 1961, when, by Public Land Order 2417 the withdrawal was revoked. The Order specified that "until 10:00 a.m. on December 26, 1961, the State of Alaska shall have a preferred right to select the lands released from withdrawal by this order * * *" By its application, A-056427, filed December 22, 1961, the State selected among others, the lands involved in this appeal. The Bureau of Land Management (BLM), in effect, held that the lands, which had been first withdrawn in 1940, have been, and have remained, closed to Native allotment ever since that date.

Appellants assert that were they given the opportunity, they "can show that their ancestors used their land prior to the effective date of E.O. 8344, and that valid existing rights secured by that use were handed down to the appellants." The gist of this argument is that the 1940 withdrawal excepted the lands occupied by their forebears, that they succeeded to the rights of those forebears, that the Board decision in Larry Dirks, 14 IBLA 401 (1974), is erroneous and that a "fair hearing" should be afforded them in order that they may produce testimony to establish this argument. In any event, they argue, the preference right of the State to select the land is necessarily subject to their continued use and occupancy after the revocation of Public Land Order 2417 and the State selection almost six months later.

[1] Appellants accurately state the facts upon which the decisions below were predicated and, notwithstanding, "demand their right to a fair hearing" to introduce evidence to show the decisions are wrong. In support of such demand they cite Goldberg v. Kelly, 397 U.S. 254 (1970), and McDonald v. McLucas, 371 F. Supp. 831, aff'd, 95 S.C. 297 (1974). The Department has consistently held that where there are no facts in dispute and the sole question is a legal issue an evidentiary hearing is not necessary. Elaine Stickelman, 9 IBLA 327 (1973); The Dredge Corporation, 65 I.D. 336 (1958).

The legal conclusions herein are based on appellants' recitation of the facts. Cumulative evidence or additional showings to demonstrate those facts would compel the same legal conclusions. Therefore, no hearing is required to permit appellants to establish those facts. The evidence submitted by appellants clearly shows that the lands were withdrawn and not open to Alaska Native allotment when their purported settlements were made. As previously enunciated in Dirks, substantial use and occupancy, as contemplated by the Allotment Act, must be by a Native as an independent individual for himself or as a head of a household. Therefore, no hearing is required to permit appellants to submit or develop further evidentiary data. Arthur C. Nelson, 15 IBLA 76; Thomas A. Rieter, 9 IBLA 56 (1973). We adhere to the rule that a hearing will not be conducted where there is no chance of development of further facts not already of record upon which a decision may be predicated. Francis Taylor, A-30282 (October 1, 1964). Appellants request for a hearing is denied. 43 CFR 4.415.

[2,3] Dirks, supra, held that an applicant for a Native allotment must meet the requirements of the statute himself and that he may not tack on the use and occupancy of his ancestors. Appellants readily concede that no rights could be initiated under the Allotment Act between the years 1940 and 1961. They argue, however, that the 1940 withdrawal was subject to the valid existing rights of use and occupancy of their ancestors which were not terminated by that withdrawal and which they inherited. They also argue that Dirks is erroneously premised on the views of the Supreme Court in LaRoque v. United States, 239 U.S. 62 (1915), and the Circuit Court decisions, United States v. Arenas, 158 F.2d (9th Cir., 1947), and Woodbury v. United States, 170 F. 302 (8th Cir. 1909). They assert that these cases are not precedent in construing the Alaska Allotment Act. They further argue that the Allotment Act makes no requirement that the allottee must show "personal" use and occupancy. This argument is immediately dispelled by mere

perusal of section 3 of the amendatory act of August 2, 1956, 43 U.S.C. § 270-3 (1970) -- "No allotment shall be made to any person under this Act until such person has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy for a period of five years."

We reaffirm Dirks. The Alaska Native Allotment Act authorizes a qualified living person to select land. The right is nonalienable, nontransferrable, and not inheritable; it terminates with death. The allotment right is personal to one who has fully complied with the law and the regulations. A Native who applies for withdrawn lands must show that he did comply with the law prior to the effective date of withdrawal, and he may not tack on his deceased parents' use and occupancy to establish a right for himself prior to the withdrawal.

Appellants initiated use and occupancy on withdrawn lands between the years 1940 and 1961. Concededly, no rights were initiated by use and occupancy of lands not open to allotment, United States v. Minnesota, 270 U.S. 181 (1926). Had appellants filed for allotment applications while the land was withdrawn, the application would have had to be rejected because the land was "Reserved" and not subject to the acquisition of rights under the Allotment Act. Appellants argue, nonetheless, that their continued use and occupancy was immediately legalized on June 26, 1961, and prohibited the State from making a valid selection because the lands were no longer vacant. But appellants fail to recognize that P.L.O. 2417 of June 26, 1961, was not an absolute revocation of Executive Order 8344. The restoration was subject to a six months' absolute preference right to the State to make selection under the Statehood Act. The preference period is specifically authorized by section 6(g) of the Alaska Statehood Act of July 7, 1958, 72 Stat. 339. In pertinent part, it provides that:

Upon the revocation of any withdrawal in Alaska, the order of revocation shall provide for a period of not less than ninety days before the date on which it otherwise becomes effective, if subsequent to the admission of Alaska into the Union, during which period the State of Alaska shall have a preferred right of selection, subject to the requirements of this Act, except as against prior existing valid rights or as against equitable claims subject to allowance and confirmation.

In the instant case, the State was afforded a six months preference right to make selection. Its selection was made within that period of time. Appellants' alleged conflicting claims were not filed for

years after the State selection. Congress has an absolute right to make disposition of the public lands in a manner in which it sees fit and its grant of a preference right to the State may not be questioned. Cf. Kake Village v. Egan, 369 U.S. 60, 65-66 (1962). Therefore, the lands never became open to occupation. Constitution, Article IV, section 3.

[4] Furthermore, the general occupancy of lands by natives' under alleged aboriginal rights cannot serve as the basis upon which appellant may predicate a claim or right to an individual allotment. Dirks, supra. Nor is it necessary to consider whether the lands were occupied by natives in the exercise of alleged aboriginal rights or, if so occupied, whether the land was open and properly embraced in a State selection. Such questions are moot. The Alaska Native Claims Settlement Act of December 18, 1971, extinguished all aboriginal claims and rights of the natives thus terminating whatever aboriginal rights if any, the natives may have had. 43 U.S.C. §§ 1603, 1617 (Supp III, 1973); Edwardsen v. Morton, 369 F. Supp. 1359 (D.D.C., 1973).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions below are affirmed.

Martin Ritvo
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Joan B. Thompson
Administrative Judge

